

# Hastings International and Comparative Law Review

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Volume 25  
Number 2 *Spring 2002*

Article 2

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1-1-2002

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### Recommended Citation

Janelle E. Kellman, *The Brazilian Legal Tradition and Environmental Protection: Friend or Foe*, 25 HASTINGS INT'L & COMP. L. REV. 145 (2002).

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# The Brazilian Legal Tradition and Environmental Protection: Friend or Foe

BY JANELLE E. KELLMAN\*

*I am the only prosecutor in the state assigned to enforce environmental laws. I try to prevent unlawful clearing of the forest. But nobody wants me to succeed. The people are against me, the politicians are against me, and the courts are against me. I keep trying. I initiate proceedings against violators. My worry, though, is that if I win one of these cases, they will kill me. What should I do?*

Statement from a Prosecutor in Amazonia, 1987<sup>1</sup>

## Introduction

Brazil is home to almost forty-two percent of the area known worldwide as the Amazon basin. This area is a vast network of jungle, rivers, and trees, containing a yet unknown richness in biodiversity and natural resources. Estimates vary, but most studies agree that this region contains at least one-third of the world's "biome," or tropical moist forest. In addition to vast stands of timber and rich mineral deposits, as much as two-thirds of the world's fresh water is located in the Amazon basin.<sup>2</sup> Despite this tremendous beauty and ecological richness, the Amazon forest is being destroyed at an unprecedented rate. For example, in 1989 a NASA report

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1. Roger W. Findley, *Legal and Economic Incentives for the Sustainable Use of Rainforests*, 32 TEX. INT'L L.J. 17, 18 (1997).

2. Henry W. McGee, Jr. & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, 21 U. MIAMI INTER-AM. L. REV. 513, 515 (1990).

revealed that in Rondonia, a state in western Brazil, more than six million acres of forest (an area the size of Vermont) had been destroyed in the four years since paved roads first reached the region.<sup>3</sup>

Rapid deforestation has prompted heavy criticism of Brazil by the international environmental and political communities. Traditionally, legal historians and international scholars have argued that the controversy surrounding the Amazon has stemmed from conflicting economic uses of the forest. Brazil's government policies in the past thirty years have been designed to open up land for settlement and to stimulate economic growth.<sup>4</sup>

Economics is only one piece of the puzzle that accounts for the massive destruction of the rainforest and its surrounding ecosystem. Brazil has a complex set of environmental regulations and statutes. Yet, as this Article will show, Brazilian legal culture and society have made it virtually impossible for these laws to succeed. More specifically, untrained and inexperienced judges and lawyers, and the lack of information regarding the ecological importance of the rainforest, have by themselves prevented successful enforcement of environmental regulations in Brazil.

This Article is arranged in four parts. Part I provides a background to the environmental problems currently plaguing Brazil. That section will give the reader a better understanding of why environmental protection in Brazil is such an important issue. Part II introduces the structure of environmental protection in Brazil and provides an overview of the various environmental statutes and regulations currently in effect there. Part III builds on Part II by addressing the relative success of these environmental regulations, concluding that the traditional Brazilian legal culture and public ignorance have severely hindered the success of these laws. Finally, Part IV offers a conclusion to this discussion and introduces ways in which the existing system can be improved.

## **I. Background to Environmental Issues**

### ***A. Destruction of the Brazilian Rainforest***

The Amazonia is the largest rainforest on earth, extending

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3. *Id.* at 521.

4. DENNIS J. MAHAR, GOVERNMENT POLICIES AND DEFORESTATION IN BRAZIL'S AMAZON REGION 9 (1989).

beyond the borders of Brazil.<sup>5</sup> Although the Amazon rainforest runs through several Latin American countries, about seventy percent of it, or approximately 360 million hectares, is located within Brazil.<sup>6</sup> Thus, almost all of Brazil's forests are located in the Amazon basin. This area covers fifty-eight percent of Brazil's total land area and accounts for thirty-three percent of the world's surviving tropical forests.<sup>7</sup> The forest is a phenomenal collection of diverse species and ecosystems. For example, scientists have identified 450 species of fish in the Amazon's Rio Negro alone, greatly dwarfing the number of freshwater fish species (200) identified in all of Europe.<sup>8</sup> The exact number of species in the forest is unknown, but scientists estimate that the forest contains fifteen to thirty percent of all the species in the entire world.<sup>9</sup> New flora and fauna are still being discovered in the Amazon rainforest. As a result, the rainforest has gained the reputation, certainly well deserved, of holding the richest collection of biodiversity on the earth.

The forest has been home to humans and animals for millions of years. Unfortunately, during the last half of the twentieth century, the world witnessed unparalleled destruction of the Amazon rainforest and its ecosystems. As recently as 1998, Brazil was described as having the highest rate of destruction among the world's forests.<sup>10</sup> Brazilian satellite data revealed that deforestation from fires and clear-cutting nearly doubled from 1994 to 1995, reaching the worst rate of destruction to date.<sup>11</sup> More recent reports suggest that this data might actually be an underreporting of the actual fires because satellite images of that region are taken only at night and the forest fires themselves are usually ignited during the day.<sup>12</sup>

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5. Cristina Schwansee Romano, *Brazilian Government Policies Towards the Amazon Rain Forest: From a Developmental Ideology to an Environmental Consciousness?*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 65.

6. David Allen Reisman, *Debt-for-Nature Swaps in Brazil: Response to World Pressure to Protect the Amazon*, 8 J. NAT. RESOURCES & ENVTL. L. 397, 399 (1992-1993).

7. Romano, *supra* note 5, at 69.

8. Reisman, *supra* note 6, at 399.

9. United Nations Development Programme, *Brazil - The Land*, at <http://www.un.int/brazil/brasil/brasil-land.htm> (last visited Apr. 1, 2002).

10. Romano, *supra* note 5, at 70.

11. Environmental Defense Fund, *Deforestation in Amazon Is Worst Ever*, at [http://www.edf.org/pubs/NewsReleases/1998/Jan/f\\_rainforest.html](http://www.edf.org/pubs/NewsReleases/1998/Jan/f_rainforest.html) (Jan. 27, 1998) [hereinafter EDF-Amazon].

12. Stephen Schwartzman, *Fires in the Amazon: An Analysis of NOAA-12 Satellite Data 1996-1997*, at

### ***B. Pinpointing the Causes of Destruction: An Ideology of Development***

The actual causes of destruction have been varied in their sources, yet consistent in their deleterious impact. Almost all the causes can accurately be described as human-initiated activities. The Brazilian government has spent billions of dollars building roads, hydroelectric dams, and other development projects designed to encourage settlement in the Amazon.<sup>13</sup> Large dams flood extensive tracts of forest and displace people and wildlife already living there.<sup>14</sup> Once-clear rivers have been polluted by the mining industry and thousands of indigenous people have been stricken by disease and driven from their homes.<sup>15</sup> As noted above, forest fires have also played an enormous role in the reduction of the rainforest. These fires are usually started by farmers in the dry season, to clear scrub in an effort to make the land available for agricultural uses.<sup>16</sup>

Many critics suggest that Brazil's ideology of "developmentalism" has been the primary driving force behind the depletion of the Amazon rainforest.<sup>17</sup> This ideology was first given concrete footing during the 1960s and 1970s when the Brazilian government embarked on a series of road building and colonization enterprises designed to integrate the Amazon region with the rest of Brazil. A Greenpeace-sponsored study has attributed ninety percent of the responsibility for forest depletion to the rampant conversion of the land to agricultural uses.<sup>18</sup>

In addition to roads and settlement subsidies, the Brazilian government also offers fiscal incentives to encourage particular land uses. Early incentive programs aimed to increase the industrial, agricultural, and ranching uses of the land, thereby increasing the conversion of forests to other uses.<sup>19</sup> One need be only slightly

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<http://darwin.bio.uci.edu/~sustain/Enso97/1097/02OctBra.html> (last visited Apr. 4, 2002).

13. Reisman, *supra* note 6, at 399.

14. Sadi Baron, *Dam Protestors Occupy Brazil's Ministry of Energy*, ENV'T NEWS SERVICE, at <http://ens.lycos.com/ens/mar2001/2001L-03-14-02.html> (March 14, 2001).

15. Reisman, *supra* note 6, at 399-400.

16. Tracey Ober, *Brazil Fires Raging Toward Major Nature Park*, at <http://forests.org/archive/brazil/firerage.htm> (Aug. 3, 1998).

17. Romano, *supra* note 5, at 72; see also Emilio F. Moran, *The Law, Politics, and Economics of Amazonian Deforestation*, 1 IND. J. GLOBAL LEGAL STUD. 397 (1994).

18. Romano, *supra* note 5, at 72.

19. See *id.* at 73.

informed to be aware of the irresponsibility inherent in this destruction. For example, estimates suggest that efforts to create grazing land have resulted in 12,000 square miles of forest being cut down every year; a forest of this size left undisturbed would produce about ten times as much food in terms of fruit, game, and fish as would the same area of agricultural land.<sup>20</sup>

Although the environmental degradation is taking place in Latin America, this is not an entirely Latin American problem. Luke Danielson, an American professor teaching in Chile, has observed that over the decades, the more developed Western countries have sent their corporations to exploit the region, offering large amounts of money to individuals with little steady income, and then publicly condemning them for the resulting deleterious effects on the environment.<sup>21</sup> In response to these criticisms, many Latin American countries have adopted environmental laws and regulations similar to those found in the United States and Europe, and there has been increased activity on the part of Latin American citizens and activist Latin American-based non-governmental organizations (NGOs).<sup>22</sup>

### C. *An Emerging Environmentalism?*

#### *Early Steps for Reform*

Brazil's capacity to pass effective environmental regulations is integrally related to its economic role in the world's markets. Despite being one of the richest countries in terms of natural resources, Brazil's economy is one of the weakest.<sup>23</sup> In the 1970s, Brazil was one of the largest oil importers in the world. As such, it had to borrow heavily to continue this practice during the oil crisis of the late 1970s. Conditions only worsened in later years, and Brazil became increasingly reliant on the rainforest for profit and as an outlet for a growing population.<sup>24</sup> Slowly at first, and then more rapidly, the

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20. Reisman, *supra* note 6, at 400.

21. See Armin Rosencranz et al., *Rio Plus Five: Environmental Protection and Free Trade in Latin America*, 9 GEO. INT'L ENVTL. L. REV. 527, 528 (1997).

22. See *id.*

23. See Reisman, *supra* note 6, at 402. Some commentators attribute the poor state of Brazil's economy to the failure of Brazil's president to make much needed reforms concerning Brazil's bloated public sector, which has too many well-paid employees doing too little, and the persistence of great poverty in many areas. See Floyd Norris, *Editorial Observer: Brazil's Economy: Moscow on the Amazon*, N.Y. TIMES, Jan. 31, 1999, at 1.

24. See Reisman, *supra* note 6, at 403. "After a decade of trade liberalisation and

forest gave way to roads, farms, and settlements.

Increased international environmental pressure finally prompted Brazil to take additional steps toward environmental protection. During the 1980s NASA satellite pictures revealed the extent of the rainforest destruction, prompting both national and international concern over the future of the rainforest. In the late 1980s Brazil's government adopted a few general measures designed to protect the environment. Finally, at the 1992 Earth Summit in Rio de Janeiro, Brazil became the focus of international scrutiny regarding its environmental practices.<sup>25</sup> Five years later, in a 1997 special session of the United Nations, Brazil joined Germany, Singapore, and South Africa in a joint commitment to reduce forest deterioration across the globe. In the same year, Brazil also joined forces with the World Wildlife Fund in an effort to dedicate ten percent of the rainforests to a national preserve by the year 2000.<sup>26</sup> Domestic, non-governmental environmental organizations in Brazil have also found a new voice in the post-Rio era.<sup>27</sup>

Despite what appears to be an emerging commitment to the rainforests, Brazil has also demonstrated its stubborn side, as shown during the 1997 Kyoto Convention on Climate Change. In Kyoto, Brazil struggled to deflect attention regarding climate change from itself and instead blame problems on the more industrialized nations.<sup>28</sup> Brazil refused to recognize publicly the critical role that rainforests play in storing carbon dioxide and the direct impact their destruction has in contributing to global warming.<sup>29</sup>

In addition to diplomatic concerns, new trade opportunities<sup>30</sup>

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six years of a successful anti-inflation drive, Brazil now has a growing and stable economy, a combination that has eluded it for several generations." *Financial Times Survey, Brazil*, available at <http://surveys.ft.com/brazil2001/> (July 20, 2001).

25. Rosencranz, *supra* note 21, at 528.

26. See Romano, *supra* note 5, at 75.

27. Antonio A. Dayrell de Lima, *Environment and Globalization: A Brazilian View*, at <http://www.brasilemb.org/evan02li.htm> (last visited Apr. 4, 2002); see also Rosencranz, *supra* note 21, at 531.

28. Antonio A. Dayrell de Lima, *The Kyoto Negotiation on Climate Change*, at [http://www.mre.gov.br/ndsg/acs/kyoto\\_ing.htm](http://www.mre.gov.br/ndsg/acs/kyoto_ing.htm) (last visited Apr. 2, 2002).

29. See *id.*

30. For example, the Southern Cone Common Market ("MERCOSUR") is a trade agreement directed at South American countries that was signed into effect in 1991. MERCOSUR unites Argentina, Brazil, Paraguay, and Uruguay into a single market area. From 1992 to 1996, the Reunion Especializada de Medio Ambiente (Special Meetings on Environment or "REMA") constituted MERCOSUR's response to environmental issues. According to some sources, REMA was "created

have also persuaded Brazil to examine its environmental policies and to plan for the preservation of its natural resources. Although much remains to be done, parties to international trade agreements have begun to incorporate environmental concerns into their negotiations. Environmental controls also affect investment in Latin American countries. Increased trade with Northern countries has exposed Latin American business and industry to the environmental and industrial standards of the North. Environmental compliance is increasingly a prerequisite to international ventures and foreign investors favor countries with consistent environmental regulations; as a result, Latin American countries are now finding it more economically advantageous to have clear environmental regulations.<sup>31</sup> It is to these environmental regulations in Brazil that we now turn.

## II. Brazilian Environmental Law

Remarking on the usefulness of environmental laws in Brazil, one scholar noted, "The ineffectiveness of laws alone to protect the environment is nowhere as evident as in the contemporary destruction of the Amazonian rain and moist forests."<sup>32</sup> As in the United States, Brazil's environmental laws are promulgated at federal, state, and local levels. Brazil's federal law number 6938 of August 1981 ("Law No. 6938"), discussed further below, created Brazil's National Environmental Policy ("NEP") and provided the backdrop for later, more progressive environmental legislation.

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to harmonize the environmental strategies of the member countries." Rosencranz, *supra* note 21, at 545-46. Others have been much more skeptical of MERCOSUR's ability to address adequately environmental concerns or to affect environmental policies in member countries. See, e.g., Pedro Villegas, *The Environmental Challenge of the Common Market in South America: REMA under MERCOSUR*, 29 GOLDEN GATE U. L. REV. 445, 449 (1999) ("MERCOSUR's environmental policy development according to the precepts of 'graduality, flexibility, and equilibrium' has proven insufficient in light of Southern Cone environmental problems. Freer trade in the region has brought negative environmental outcomes linked to large-scale infrastructure projects and to the intensification of export industries.").

31. Rosencranz, *supra* note 21, at 547. According to Rosencranz:

ISO 14000, the North American Free Trade Agreement (NAFTA), and assimilation of higher standards through both trade with Northern companies and investment by Northern companies are all responsible for any such gain. Latin America's exposure to the environmental norms that tenacious NGOs have succeeded in fastening to international business mechanisms has introduced an element of risk that had not previously existed in the Latin American business setting.

*Id.* at 528.

32. Moran, *supra* note 17, at 399.



Despite numerous environmental measures, many forces have combined to prevent the success of these laws. A brief examination of the laws and the structure of environmental regulation in Brazil is helpful in understanding their limited effect thus far.

### A. *Institutional Structures*

#### 1. *Federal Constitution of 1988*

Brazil's federal constitution, rewritten in 1988 ("Constitution"), provides the direction for most of the regulations in Brazil's twenty-seven states. Environmentalists had hoped that the Constitution would mark a great advance for environmental protection in Brazil by making environmental concerns a national priority, at least on paper. The Brazilian Constitution attempts to provide a comprehensive approach to environmental protection. Perhaps most importantly, at least rhetorically, is its guarantee of a healthy and stable environment to all Brazilian citizens. The truth, however, is that the "promise of the amendments" contained in the Constitution has been "illusory."<sup>33</sup>

The Constitution establishes administrative and penal sanctions for those in violation of its environmental "mandate." Brazil's Constitution provides, through Article 4, for the protection of Brazil's forests by declaring them to be a "national patrimony" and allowing their use only under special conditions that ensure environmental preservation.<sup>34</sup> However, in Brazil, as in other Latin American countries, the federal government is poorly adapted to address natural resource management because it is "over-politicized, sanctions-oriented, and without public participation in [its] functions."<sup>35</sup> As a result, critics contend that "[a]ttempts to embody environmental protection clauses in national constitutions, such as Brazil's, do not appear to have appreciably influenced the prevailing bureaucratic culture."<sup>36</sup>

The Constitution also divides responsibility for environmental protection among federal, state, and municipal bodies. The relative

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33. Rosencranz, *supra* note 21, at 567.

34. For an excellent discussion of Brazil's environmental laws, see Peter C.L. Roth, *The Emerging Role of the Extractive Reserve in the Enforcement of Brazilian Deforestation Controls*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 247, 258-69 (1991).

35. Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 1, 26 (2000).

36. *Id.*

power of each level of government in protecting the environment is not always clear. The federal government is usually credited with formulating general and strategic requirements, while the state and local bodies issue more specific and, at times, more restrictive environmental measures.<sup>37</sup> Articles 23 and 24 of the Constitution, which specifically assign environmental protection to various bodies, are worth noting here. Article 23 extends “common legislative competence” to the federal government, states, and municipalities to protect “notable natural landscapes and the environment.”<sup>38</sup> Similarly, Article 24 provides the federal union, the states, and the municipalities with “concurrent legislative competence” over forests, hunting and fishing, protection of species, and mitigation of environmental damages.<sup>39</sup>

The shared nature of environmental protection in Brazil can have many repercussions. Concurrent legislation means that the federal government has absolute power (plenary power) to establish laws and regulations, and the states and municipalities have only limited power. In some respects, this means that the Constitution limits the federal government’s role solely to the creation of general terms, but leaves to the states and municipalities broad discretion to implement more or less restrictive specific measures.<sup>40</sup> In the wealthier states, this method of lawmaking leaves room for committed governors and lawmakers to increase environmental protection. Conversely, this sharing of power can enable poorer states to enact weaker environmental provisions. In addition, the vesting of the lawmaking function in the state legislatures essentially places the burden of enforcement upon these local bodies. Unfortunately, poorer states may lack both the resources and the political will to enact and enforce environmental measures.<sup>41</sup>

## 2. *Brazil’s NEP (Law No. 6938)*

Brazil’s NEP, codified in 1981 as Law No. 6938, provides a comprehensive administrative system for Brazil to deal with environmental concerns. Law No. 6938 has three specific purposes: (1) to protect and enhance the existing environment, (2) to reclaim

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37. Eugenio M. Singer, *Doing Business in Brazil: An Intro to EnviroRequirements*, 13 NO. 2 ENVTL. COMPLIANCE & LITIG. STRATEGY 5, 6 (1997).

38. Roth, *supra* note 34, at 259.

39. *Id.*

40. Moran, *supra* note 17, at 399.

41. Roth, *supra* note 34, at 259.

the damaged environment, and (3) to ensure sustainable socioeconomic development.<sup>42</sup> The Brazilian government outlined three mechanisms in Law No. 6938 to achieve these objectives: (1) the adoption of the NEP, (2) the creation of a national environmental council ("CONAMA"), and (3) the institution of the Federal Technical Register of Environmental Defense Means and Activities.<sup>43</sup>

Brazil's NEP is a brief but broad mandate designed to create a more unified approach to protecting the environment. Among the policy's general objectives are the achievement of sustainable development; the identification of priority areas; the creation of environmental standards and criteria; and research, education, and development regarding natural resources. The NEP is implemented by federal, state, and local agencies operating under the direction of SISNAMA, Brazil's National Environmental System.<sup>44</sup> "Under SISNAMA, state 'sectional bodies' and municipal 'local bodies' supervise and are responsible for environmental activity within their spheres of jurisdiction."<sup>45</sup>

The Brazilian government created additional agencies to direct SISNAMA. CONAMA, which is under the direction of the Brazilian executive branch, is composed of various representatives of state government, industry, and environmental groups. CONAMA's primary responsibility is the coordination of environmental protection through the creation of regulations and licensing standards.<sup>46</sup> Although CONAMA is supposed to represent a variety of environmental interests, its members have traditionally been representatives of commerce and industry, and CONAMA's agenda is accordingly biased.<sup>47</sup>

CONAMA's responsibilities under Law No. 6938 are varied, ranging from the creation of environmental norms and standards to acting as the final resort in appeals of administrative sanctions.<sup>48</sup>

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42. NATIONAL ENVIRONMENTAL POLICY, DIARIO OFICIAL, LEI 6938 (Braz.), available at WESTLAW, Enflex-Br Database (translated in Felipe Paez, *Environmental Framework Laws in Latin America*, 13 PACE ENVTL. L. REV. 626 (1996)).

43. Adriana Lieders, *A New Chapter in Brazil's Oil Industry: Opening the Market While Protecting the Environment*, 13 GEO. INT'L ENVTL. L. REV. 781, 783 (2001).

44. See Paez, *supra* note 42, at 627.

45. Rosencranz, *supra* note 21, at 566.

46. Roth, *supra* note 34, at 261.

47. See *id.*; see also Roger Findley, *Pollution Control in Brazil*, 15 ECOLOGY L.Q. 1, 19 (1988).

48. Singer, *supra* note 37, at 6.

CONAMA also holds final decision-making power regarding suspension of the financial benefits conferred by public authorities for those who violate the NEP. If CONAMA so decides, such violations could lead to fines, suspension of benefits, cancellation of all activities, or any combination thereof.<sup>49</sup>

Originally, the tier below CONAMA was SEMA, the Special Secretary for the Environment. SEMA functioned as an advisor to CONAMA in matters of regulations and standards, the application of environmental criteria, and monitoring of private projects.<sup>50</sup> SEMA was abolished, however, by a series of reforms in 1989 and replaced by the Brazilian Environment and Renewable Natural Resources Institute ("IBAMA"). IBAMA's mandate is to administer federal environmental requirements.<sup>51</sup> IBAMA issues licenses and permits for the use of natural resources and assists CONAMA in areas where local measures and resources are unable to perform according to federal standards.<sup>52</sup> IBAMA also works with CONAMA, providing administrative and technical support when necessary.<sup>53</sup>

The Ministry of Environment is another governmental body that plays an important role in Brazil's environmental regulations. The ministry's main tasks are to coordinate CONAMA and IBAMA and to facilitate the exchange of information at both the federal and state levels.<sup>54</sup>

### 3. *Additional Statutes and Regulations*

Additional environmental regulations have been proposed since the NEP was first created in 1981. These new regulations, introduced at federal and state levels, have addressed a range of environmental concerns including pollution, criminal sanctions, and preservation of the rainforest. Through Decree No. 1963, signed into effect June 25, 1996, the government addressed the problem of widespread illegal mahogany extraction by suspending the issuance of new permits for commercial exploitation of mahogany for two years.<sup>55</sup> Provisional Measure No. 1511 of July 1996 aimed at increasing the number of legally reserved areas of rural holdings with forest cover and

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49. Paez, *supra* note 42, at 630.

50. *See id.*

51. Singer, *supra* note 37, at 6.

52. *See id.*

53. Rosencranz, *supra* note 21, at 565.

54. *See id.*

55. Romano, *supra* note 5, at 73.

restricting clear-cutting. Although these measures impose stricter requirements on paper, they are not routinely enforced and represent merely temporary measures rather than long-standing environmental change.<sup>56</sup> Environmental issues have clearly become a greater concern in Brazil; however, two more recent bills, discussed below, indicate that commitment to the environment is still fairly weak.

In January 1998, as new reports of rainforest destruction were being made public, the lower house of the Brazilian Congress was voting on the Brazilian Environmental Crimes Act.<sup>57</sup> This bill was one of the most critical environmental bills to date in Brazil; passage of the act would give IBAMA statutory authority to enforce environmental law for the first time since 1989.<sup>58</sup> Although this act would provide Brazil with the ability to take a strong stand against environmental crimes, government leaders in the Congress substantially weakened the law to mollify ranching and industrial special interests opposed to it.<sup>59</sup> Language that would have made corporations liable for environmental crimes was removed, leaving the law applicable only to individuals.<sup>60</sup> However, the approval of the Environmental Crimes Act does represent an important step towards protecting the rainforest.<sup>61</sup> Brazilian President Fernando Henrique Cardoso signed the bill into effect on February 12, 1998, taking a major step forward in establishing penalties for crimes against the environment and providing a long-awaited mechanism for IBAMA to enforce such penalties.<sup>62</sup>

In late 1999, another forest bill was introduced into the Brazilian Congress. The proposal, which received the approval of Brazil's National Council for the Environment, required that landowners maintain eighty percent of their individual rainforest holdings in a natural state but reduced the amount of savanna area that must be kept intact from fifty to thirty-five percent.<sup>63</sup> The 1999 bill was introduced in response to the 1996 provisional measure, which was created by executive proclamation and has been the target of virulent

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56. *See id.*

57. *See Findley, supra* note 1, at 18.

58. EDF-Amazon, *supra* note 11.

59. *See id.*

60. *See id.*

61. Romano, *supra* note 5, at 75.

62. *See id.*

63. *Environmentalists Welcome Brazilian Amazon Reserve Package*, at <http://www.forests.org/archive/brazil/newbfco.htm> (Apr. 2, 2000).

opposition from the farm lobby in Brazil's Congress.<sup>64</sup> Many lauded the 1999 bill as a reasonable compromise for its incorporation of both environmental and developmental needs.<sup>65</sup> The extent to which this actually helps the environment remains to be seen.

### ***B. Enforcement and Article 14***

In a region where enforcement of environmental regulations is met with strong opposition, Article 14 of Law No. 6938 ("Article 14") has become increasingly important in pinpointing what needs to be done to make the laws more effective. Article 14 establishes fines, loss of subsidies and credit, and suspension of activity for those who violate the NEP.<sup>66</sup> Unfortunately, Article 14 suffers from erratic and ineffective implementation.<sup>67</sup> Strong industrial and commercial lobbies at the federal level, as well as political pressure at the state and local levels, have greatly influenced the level of enforcement for environmental violations.<sup>68</sup> Article 14 gives varying degrees of enforcement power to IBAMA, attorneys general, and local government. A brief discussion of each of these three will highlight the major impediments to enforcement and provide a background for a discussion of the larger societal and legal impediments to the success of Brazil's environmental laws.

#### ***1. IBAMA***

IBAMA controls Brazil's national forests and is the agency responsible for designing and implementing the forests' multiple use plans. IBAMA has the unique power to enter into contracts with private entities and to create extractive reserves to preserve indigenous ways of life. The biggest problem with IBAMA is that many of the so-called parks under its direction exist only on paper; that is, IBAMA has no funding to operate the parks or to hire staff to monitor the protected areas.<sup>69</sup> For example, IBAMA has only 275 environmental inspectors and one helicopter to monitor 5.1 million square kilometers of forest, thereby allocating one inspector for every

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64. *Id.*

65. *Id.*

66. See Paez, *supra* note 42, at 627.

67. Roth, *supra* note 34, at 262.

68. See *id.*

69. See *id.* at 266; see also Diana J. Eitman, *Maintaining Sovereignty and the Tropical Rainforests: The Promise of Debt-For-Nature Swaps*, 24 SPG ENVIRONS ENVTL. L. & POL'Y J. 29, 32-33 (2001).

18,500 square kilometers.<sup>70</sup> Furthermore, in 1998, only \$8 million of the Ministry of Environment's \$1.6 billion budget was allocated to the staff covering Brazil's rain forest.<sup>71</sup> In the past two years, IBAMA has been responsible for the creation of several extractive reserves.<sup>72</sup> However, until the federal government commits to making IBAMA a financially viable entity, forest control and supervision will continue to be a haphazard and often neglected task.

## 2. *Brazilian Attorneys General and Citizen Suits (Law No. 7.347)*

Article 14 specifically gives Brazilian attorneys general the legal authority to bring both civil and criminal suits to collect damages when there has been a violation of environmental regulations. The attorneys general have broad discretion to interpret the regulations and to decide who is culpable under Brazilian legal theories. Not surprisingly, this system seems to be subject to abuse. Article 14 suits are also limited by a lack of legal precedent concerning citizen suits. Fortunately, Article 14 gives attorneys general additional power to bring public civil suits. In some southern states, where economies are more well-developed, there have been reports of several successful public suits brought by attorneys general to recover damages.<sup>73</sup>

Four years after the creation of Brazil's NEP an even more dramatic law was passed—Law No. 7.347. This law finally brought the public into the fight for the rainforest and the Brazilian environment by authorizing civil suits for monetary damages and injunctive relief by environmental groups as well as attorneys general. For many, this “recognition of standing for private associations to bring citizen suits on behalf of diffuse interests represented a radical change in theory.”<sup>74</sup> Together with Article 14, this new law has opened the door for citizens' groups to take action to protect the environment in instances when the government is slow to respond.

## 3. *Local Government*

Almost every study of the Amazon rainforest and Brazil

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70. See Romano, *supra* note 5, at 75.

71. Katherine Ellison & Georgia Tasker, *What's Gone Wrong? Politics Slow Efforts to Preserve Brazil's Amazon Rainforest*, MIAMI HERALD, Oct. 25, 1997, at 1G.

72. See Roth, *supra* note 34, at 258-69.

73. See *id.* at 264-65.

74. Roger W. Findley, *Foreword: Symposium: Sustainable Development in Latin American Rainforests and the Role of Law*, 32 TEX. INT'L L.J. 1, 5 (1997).

highlights the struggle inherent in promoting development while simultaneously trying to prevent deterioration of natural resources. Brazilian state and local government officials are not immune to this tension. In fact, because these officials see the plight of their communities firsthand, such tension guides their actions as much as, if not more than, those of officials at the federal level. As one researcher put it, "Amazonian state officials live a strangely torn existence; while they are steadfastly committed to developmental goals, they express concern that the federal government has not protected aggressively enough the environment in the Amazon Basin."<sup>75</sup>

In order for local environmental laws to have a significant impact on the environment, two elements must exist. First, state officials must learn how to balance competing interests, particularly the tension between the developmental needs of their local communities and the national need for environmental protection. Second, politicians as well as the electorate need a better understanding of the enormity of the environmental destruction involved. Such an understanding might manifest itself in new environmental regulations that try to incorporate both local and national concerns regarding development and the environment.

### **III. The Brazilian Legal Tradition and Environmental Protection**

The disparity between the laws on the books and the laws in action has prompted practitioners and legal scholars to conduct a closer examination of the legal traditions underlying Brazil's environmental laws. Lack of enforcement is one of the major obstacles to improving the success of environmental regulations in Brazil.<sup>76</sup> Enforcement depends not only on local authorities, but also on members of the Brazilian legal community to show a dedication to the fair resolution of environmental issues. During a presentation at a 1997 symposium at the University of Texas, Jose Paulo Sepulveda Pertence, Chief Justice of the Federal Supreme Court of Brazil, acknowledged that despite the enactment of Brazilian laws to protect many aspects of the environment, the nation lacks a comprehensive

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75. Roth, *supra* note 34, at 268.

76. See Lila Katz de Barrera-Hernandez & Alastair R. Lucas, *Environmental Law in Latin America and the Caribbean: Overview and Assessment*, 12 GEO. INT'L ENVTL. L. REV. 207, 230-31 (1999).



approach.<sup>77</sup> Pertence highlighted the importance of the NEP and Law No. 7.347's citizen-suit provision, but lamented the relative lack of such suits. The cause, Pertence argued, is Brazil's traditional legal culture, i.e. the unwillingness of prosecutors to act, coupled with a conservative judicial system and public apathy.<sup>78</sup>

These issues—the judiciary, Brazil's traditional legal culture, and the lack of public awareness regarding the environment—have become increasingly critical elements in Brazil's struggle to implement lasting environmental reform. A recent study of Latin American countries suggested that “weak enforcement seems to be caused more by lack of human and financial resources and institutional capacity than by lack of adequate legislation.”<sup>79</sup> Although economics may be the driving force behind destruction of the rainforest, it is the failure not only of the laws, but also of those who interpret them, that poses a grave impediment to lasting social change.

## **A. Brazil's Judicial System**

### *1. The Need for Reform*

Over the past twenty to twenty-five years, most developed countries have exhibited an increasing awareness of environmental issues, and have recognized environmental concerns alongside traditional political agendas involving trade and diplomacy. However, even the advent of a new millennium has not convinced everyone that traditional social and legal systems might need to be revamped and replaced with more modern, sustainable practices. Nowhere in Brazil is this more evident than in the judiciary.

Brazil's judiciary has been the object of many reform measures since the colonial period. Many of the recent reform measures have focused on restructuring the courts, remedying procedural deficiencies, and giving judicial decisions the force of binding precedent in Brazil.<sup>80</sup> To respond to more “modern” concerns such as the environment, even greater reforms are needed.

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77. See Findley, *supra* note 74, at 4.

78. See *id.* at 4-5.

79. De Barrera-Hernandez & Lucas, *supra* note 76, at 231.

80. Keith S. Rosenn, *Judicial Reform in Brazil*, NAFTA: L. & BUS. REV. AM. 19, 23 (1998).

## 2. *Judicial Deficiencies as an Impediment to Environmental Regulation*

Deficiencies in Brazil's judiciary are a primary impediment to the success of the country's environmental laws. Antonio H. Benjamin, Chair of Lawyers for a Green Planet in Brazil, asserts that the greatest challenge to enforcement of environmental laws in Brazil comes from the cultural values of the general population and the judiciary.<sup>81</sup> Even members of the judiciary recognize this deficiency. Chief Justice Pertence, speaking at a symposium on sustainable development and the role of law in Latin America, expressed similar sentiments. He stated that the many judicial barriers to enforcement of environmental laws can be attributed to a conservative legal culture, especially when long-standing economic interests are threatened.<sup>82</sup> Although Brazil and the international community have celebrated the passage of Law No. 7.347 which allows citizen suits, getting one's day in court means very little if judges are unwilling to place environmental concerns on an equal footing with economic development.

If the environment is to garner a place in the development debate, judges will have to provide strong leadership both inside and outside the courtroom. Brazil is constantly juggling its economic concerns with environmental interests. Brazil's government can pass a multitude of environmental laws, but this legislation means nothing if it is continually ignored in the place where laws are supposed to mean the most—the judiciary. Judges as well as lawyers suffer from inadequate training and an “incongruity between theory and practice in these new areas of Brazilian law.”<sup>83</sup> Legal practitioners and decision makers are still deeply engrained with the old way of thinking, under which economic lobbies rule the courts and lawmaking bodies. According to one practitioner, “Judges do not understand new concepts and trends like ‘sustainable development’ and private enforcement of collective rights.”<sup>84</sup> Eladio Lecey, co-director of the Judicial School in Brazil, has also cited an “attitude problem” on the part of judges as a handicap to the implementation of environmental law in Brazil.<sup>85</sup> Not only are judges not well versed

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81. Findley, *supra* note 74, at 4.

82. *Id.* at 5-6.

83. *Id.*

84. *Id.* at 6.

85. *See id.* at 12.

in environmental regulations, but they also lack creativity in interpreting such laws.<sup>86</sup>

As a whole, the Brazilian judiciary is inexperienced with respect to the law and other aspects of life in general. Much of this inexperience can be attributed to the relatively young median age of judges (42) and the homogeneity of the judicial system (the Brazilian judiciary is largely young and male).<sup>87</sup> Data regarding the social and ethnic makeup of the judiciary also suggest that the lower classes are not well represented in the judiciary.<sup>88</sup> The judiciary may be unable to relate to the plight of the poor farmer in the Amazon or to the new environmental groups' concerns. Taken as a whole, this homogenous and relatively inexperienced judiciary is ill equipped and poorly trained to deal with a new world order.

The competition for resources between developers and environmentalists will likely not cease in the near future. This tension will continue to plague Brazilian society, even more so if judges are unwilling or unable to step in and act as intermediaries. Judges will have to assume a new role, one in which they address tensions not just between individuals, but between groups within society as well.<sup>89</sup> Judges are also in a unique position to promote new social policies and values through their decisions. Though there is currently no *stare decisis* in Brazil, judges are appointed to a lifetime tenure and are respected members of the community. Their leadership in this area could give Brazil's environmental laws some real teeth to go along with their many pages in the law books.

### ***B. Brazilian Lawyers and Environmental Consciousness***

For many, life as a lawyer in Brazil is filled with contradictions and inconsistencies. As Professor Joaquim Falcao has observed, lawyers are too often concerned more with idealistic visions of what they should be doing and less with the legal reality of their lives and professions.<sup>90</sup> As a result, lawyers hold high aspirations but fail to live

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86. *See id.*

87. *See* Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT'L L. 230, 246 (1999).

88. *See id.*

89. *See, e.g.,* Findley, *supra* note 74.

90. Joaquim Falcao, *Lawyers in Brazil: Ideals and Practices*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 400-42 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

up to their own expectations. This dichotomy of desire versus reality has become increasingly apparent in the fight for environmental consciousness by lawyers.

### *1. Lack of Education and Training*

A Brazilian legal education does little to prepare lawyers for the practice of environmental law. The Brazilian Federal Council of Education issues standardized regulations for the entire country with respect to almost all aspects of legal education.<sup>91</sup> In addition to standardization, there is also a demand for *unspecialized* training. Some feel that this demand reflects the residual and historico-cultural functions of law school.<sup>92</sup> In recent years the Brazilian Bar Association has fought against the formalistic, rhetorical, conservative, and largely unspecialized instruction provided at Brazilian law schools, but attempts to reform the system have failed thus far.

This lack of training and the corresponding gaps in Brazilian legal education are particularly apparent to those involved with the actual practice of Brazilian environmental law. Fabio Feldmann, Secretary of the Environment for the state of Sao Paulo, notes the difficulty Brazilian lawyers have in working with environmental regulations.<sup>93</sup> Feldmann asserts that lawyers must be trained in a new way, one that sees the law as an instrument for social change and for the advancement of new social concerns.<sup>94</sup> He also urges that lawyers receive a multidisciplinary education, including training in fields such as biology and ecosystem management.<sup>95</sup>

In addition to problems with their formal legal education, lawyers in Brazil also have difficulty finding opportunities for practical training after law school. Most internships are based on the social connections of the student rather than on objective qualifications.<sup>96</sup> As a result, the vast majority of Brazilian lawyers are embarking upon their legal careers with little or no specific training, particularly in the field of the environment, and are rapidly gaining reputations as being pro-polluter.<sup>97</sup>

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91. *Id.* at 404.

92. *See id.* at 405.

93. *See* Findley, *supra* note 74, at 6.

94. *See id.*

95. *See id.*

96. *See* Falcao, *supra* note 90, at 406.

97. *See* Findley, *supra* note 74, at 12.

## 2. *Financial and Societal Constraints*

In addition to inadequate training in the field of environmental law, Brazilian environmental lawyers also often work under severe financial constraints. Attorneys general can bring actions to recover for environmental damage; however, attorneys general in the most affected regions of Amazonia are often understaffed and unable to cover the entire region.<sup>98</sup> Relative to their southern counterparts, Amazonian attorneys in particular lack experience in environmental protection.

Given the constant tension between development and environmental protection, lawyers in Brazil must also be acutely sensitive to the sociopolitical needs and desires of their communities. Through the late 1980s and early 1990s, there were numerous reports of threats against both prosecutors and state officials who attempted to enforce environmental regulations.<sup>99</sup> Most observers agree that agents of the state who try to further environmental regulation in opposition to powerful and wealthy local interests will be warned not to report violations and threatened with bodily harm.<sup>100</sup> Faced with strong opposition from entrenched interests, prosecutors may opt to ignore environmental violations rather than risk their lives.<sup>101</sup>

As a whole, lawyers in Brazil seem to lack commitment to lasting social change. As mentioned above, most are more concerned with what they should be doing rather than what they are actually doing. As one critic has commented, "Brazilian law graduates . . . are strongly committed to the Western ideals of the rule of law and liberalism, but their actual legal practice adheres to legal formalism and dogmatics."<sup>102</sup> Despite this relative inaction, hope may be found in their commitment to liberal ideals. What is now needed are a society and an educational system in which these values are encouraged and made more commonplace.

## C. *Countering Legal Expectations*

Motivating judges and lawyers to protect the environment is only one aspect of the legal problem in Brazil. Another perhaps even more critical element is the need to show, and in some instances

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98. See Roth, *supra* note 34, at 267.

99. See Findley, *supra* note 1, at 18.

100. See Moran, *supra* note 17, at 400.

101. See Findley, *supra* note 1, at 18.

102. See Falcao, *supra* note 90, at 434.

convince, the citizens of Brazil that environmental regulation is necessary for their survival. A major obstacle that must be overcome is reconciling Brazil's archaic notions of the rights of land ownership with environmental needs.<sup>103</sup> Under traditional land-ownership laws in Brazil, the intervention of government officials in privately owned land matters was unheard of; yet, in this age of massive rainforest destruction, such intervention may be necessary to preserve an entire ecosystem instead of only fragmented portions of habitat.

Environmental protection is also at odds with traditional notions of land use and conversion.<sup>104</sup> The Brazilian Land Law of 1964 set an environmentally harmful precedent in allowing new settlers to gain tenure by occupying and cultivating land in the Amazon. In practice, that came to mean that removal of forest cover was required to show actual use of the land.<sup>105</sup> Much of the destruction of the rainforests over the past fifteen years is due to small farmers and other land users attempting to claim the land.<sup>106</sup>

The inability to phase out traditional land use practices demonstrates that Brazil's population is not used to putting environmental concerns at the forefront of its consciousness. In a country where national debt is a recurring concern, Brazil's citizens have difficulty looking past their immediate economic needs in order to focus on larger environmental issues. Brazil is home to tremendous natural resources, but it is still a developing country with serious social and class problems as well as an unstable economy. NGOs have acted to increase environmental awareness; nevertheless, critics assert that environmental protection has been hindered because Brazil's population "has never fully recognized the importance and complexity of these environmental issues."<sup>107</sup> Similarly, legislation is often difficult to enforce because the general population lacks an understanding of these laws. As one attorney general pointed out, "Everyone understands development, but few understand sustainability."<sup>108</sup> Clearly, then, tremendous gains in enforcement could be made simply through increased educational

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103. See Moran, *supra* note 17, at 401.

104. See Findley, *supra* note 1, at 22-24, 34.

105. A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L. J. 37, 60 (1997).

106. See *id.*

107. Romano, *supra* note 5, at 75.

108. Findley, *supra* note 74, at 6.

efforts that give Brazilians an accurate and fair depiction of what is going on in their own country.

#### IV. Conclusion

Despite numerous environmental laws, Brazil still lacks a comprehensive approach to environmental issues. Governmental agencies are plagued by budgetary constraints and bureaucratic restraints. Not surprisingly, economic development continues to guide planning decisions and influence enforcement of environmental regulations. There are many reasons why Brazil's environmental program has not been a great success. Brazil is a country with a wide range of problems including social stratification, racial tension, and debt. Yet, with so many environmental laws in place, those problems alone cannot explain why environmental regulations have not succeeded.

Keeping in mind the many different interests impacted by environmental regulation in Brazil, it becomes evident that Brazil's legal history and tradition have greatly impacted the enforcement of environmental laws. Judges and lawyers are poorly trained and uninformed about relevant environmental issues. In some respects this ignorance is to be blamed on the Brazilian educational system, i.e. the conservative nature of law school curriculums mandated by the federal government and the lack of training programs in place for both lawyers and judges. However, one must also question the motives of individuals in the legal profession. As Falcao points out, law schools play three functions: residual, absorbing the university students who were not accepted for enrollment elsewhere; historico-cultural, providing a general education for professional services; and legal-technical, training individuals for the practice of law.<sup>109</sup> Thus many individuals do not enter law school or the legal profession out of a desire to practice law or a commitment to social change, but rather because other professional options were not available to them.

Brazilian legal culture does not easily lend itself to the enforcement of environmental regulations. Lack of information and misinformation leave Brazilians largely unaware of the ramifications of their actions. In addition, Brazil's conservative legal history has made it difficult for practitioners to formulate creative solutions to environmental concerns or to counter wealthy, entrenched interests.

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109. See Falcao, *supra* note 90, at 404.

Economic considerations do lead people to utilize the forest in a harmful manner, but it is Brazil's legal culture that stymies enforcement of environmental regulations and prevents the acceptance of such enforcement in the mainstream legal culture. Perhaps, then, the key to environmental protection lies not just in altering development strategies, but in changing the manner in which Brazil's judges and lawyers approach and enforce the law.



